Supreme Court, U.S.
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No. 08-397

AMER RECORDS AND BRIEFS

IN THE

Supreme Court of the United States

BENISTAR LTD., BENISTAR EMPLOYER SERVICES TRUST CORPORATION, BENISTAR ADMIN SERVICES, INC., DANIEL CARPENTER, MOLLY CARPENTER, and CARPENTER FINANCIAL GROUP, LLC,

Petitioners,

v.

GAIL A. CAHALY, JEFFREY M. JOHNSTON, BELLEMORE ASSOCIATES, LLC, MASSACHUSETTS LUMBER COMPANY, INC., JOSEPH IANTOSCA, INDIVIDUALLY AND AS TRUSTEE OF THE FAXON HEIGHTS APARTMENTS REALTY TRUST AND FERN REALTY TRUST, and BELRIDGE CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR REHEARING

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Benistar Ltd., Benistar Employer Services Trust Corporation, Benistar Admin Services, Inc., and Carpenter Financial Group, LLC, state that the corporate disclosure statement included in the petition, *see* Pet. at iii, remains accurate.

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PETITION FOR REHEARING

Pursuant to Rule 44.2, the Benistar defendants respectfully petition for rehearing of the Court's December 1, 2008 order denying certiorari. While the Benistar defendants realize that this Court hardly ever grants petitions for rehearing, this petition for rehearing is intended to clarify (without restating) arguments advanced in the original petition and to expound on those points that were perhaps overlooked by the Court. *See Hickman v. Taylor*, *cert. denied*, 327 U.S. 808 (1946), *reh'g granted*, 328 U.S. 876 (1946), *decided by*, 329 U.S. 495 (1947); *Boumediene v. Bush*, *cert. denied*, 127 S. Ct. 1478 (2007), *reh'g granted*, 127 S. Ct. 3067 (2007), *decided by*, 128 S. Ct. 2229 (2008). A certification of counsel that this petition is presented in good faith and not for delay, and that the grounds for this petition are intervening circumstances of a substantial and controlling effect and other substantial grounds not previously presented, is annexed.

GROUNDS FOR REHEARING

1. Every first-year law student learns that before dealing with the merits of a case, a court must first determine whether it has subject matter jurisdiction over the claims presented and personal jurisdiction over the defendants. *See* Douglas D. McFarland, *Drop The Shoe: A Law of Personal Jurisdiction*, 68 MO. L. REV. 753, 753 ("The history of personal jurisdiction jurisprudence in the United States is familiar to courts, scholars, and first-year law students alike."). However, the constitutionally required analysis regarding personal jurisdiction did not take place here at all—not in the trial court, not in the Appeals Court, and not even in the Massachusetts Supreme Judicial Court ("SJC") upon rehearing. The plaintiffs stipulated in writing

that the requirements of the Massachusetts long-arm statute were not satisfied as to several of the Benistar defendants including Benistar Admin Services, Inc. ("BASI"). *See* Pet. App. 87a-90a. And because BASI was and has for the past decade always been 100% owned by an employee stock ownership plan (ESOP), piercing BASI's corporate veil shows that it is owned by an employee benefit plan governed by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"). Because the SJC ignored this Court's directive "that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) (citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)), the Benistar defendants have been denied justice as well as Due Process.

2. The denial of Due Process here is even more egregious than that which occurred in *Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000), where Justice Ginsburg wrote for a *unanimous* Court:

> To summarize, Nelson was never afforded a proper opportunity to respond to the claim against him. Instead, he was adjudged liable the very first moment his personal liability was legally at issue. Procedure of this style has been questioned even in systems, real and imaginary, less concerned than ours with the right to due process.

Id. at 468. Justice Ginsburg then quoted sections of the immortal classic *Alice in Wonderland and Through the*

Looking Glass. See id. at n.2. This is profoundly perfect to describe how all of BASI's employee-owners feel in having their Connecticut-based company dragged into a Massachusetts court and found to be liable on a multi-million dollar judgment in a case they had nothing to do with even though the plaintiffs stipulated in writing that not only were the elements of the Massachusetts long-arm statute not satisfied as to BASI, but also that the plaintiffs themselves never had any contacts, communications, or dealings with BASI. Instead, the plaintiffs merely sued any and every entity they could find with "Benistar" or "Carpenter" in its corporate name. In short, in a case that only the "Red Queen" could understand, BASI was found liable for torts that the plaintiffs stipulated BASI did not commit in a State with which the plaintiffs stipulated BASI had no contacts—minimum or otherwise. That the Massachusetts courts failed to apply the constitutionally required *International Shoe* and *Shaffer* tests to BASI and the remaining petitioners essentially means that petitioners did not have an opportunity to be heard that personal jurisdiction over them was lacking, thereby violating the Due Process Clause of the Fourteenth Amendment. "The fundamental requisite of due process of law is the opportunity to be heard." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

Unlike in *Nelson*, BASI was never and is not now owned or controlled by any other Benistar entity or the Carpenters. Just as this Court unanimously found that it was a violation of Due Process to find Nelson liable for the actions of his wholly-owned company (Nelson was the sole shareholder), so too it is a violation of Due

Process for BASI to be found liable for the actions of other persons and entities that are *not* its shareholder or related to it in any way absent a full and fair hearing on personal jurisdiction in which this Court's precedents are applied. For the Massachusetts courts to exert personal jurisdiction over BASI and the remaining petitioners without conducting the required constitutional test—where the plaintiffs stipulated in writing that both parts of that test were not satisfied—is such a flagrant and egregious violation of Due Process as to shock the conscience. This is particularly so where the Due Process violation itself was predicated upon a theory of jurisdictional veil-piercing that finds no support in *any* of this Court's cases. *See, e.g.*, *Dole Foods Co. v. Patrickson*, 538 U.S. 468, 474 (2003) ("A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities."). Even worse, the SJC erroneously upheld the application of Massachusetts law to ostensibly pierce the veil of Delaware corporations.

3. The doctrine of limited liability is a basic and fundamental rule of corporate law, and it has served society well by encouraging corporate enterprise without risk of personal liability for the corporation's debts. *See, e.g.*, *Anderson v. Abbott*, 321 U.S. 349, 362 (1944) ("Limited liability is the rule not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted."). Shareholder protection through the corporate form is "ingrained in our economic and legal systems" and, indeed, "no one would claim that the availability of limited liability [has] played an insignificant part in the expansion of industry and in the growth of

trade and commerce." *See* (then-Professor) William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L. J. 193, 193 (1929).

This Court has a long history of preserving the distinction between corporate and subsidiary entities and recognizing the sanctity of the corporate structure to protect individual shareholders. *See, e.g., Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925). It is important to note, however, that neither BASI nor any of the other petitioners had any direct ownership or affiliation with the main defendant in the Massachusetts action. Clearly, there was no "parent-subsidiary" relationship that could be exposed by any type of veil-piercing analysis, whether that was done before or after the constitutionally required analysis for personal jurisdiction. However, there was no analysis done here, not even one that was constitutionally flawed.

In yet another *unanimous* decision of this Court, Justice Souter went to great lengths to explain the importance of America's constitutional heritage in not having the corporate veil so easily pierced as to make the parent liable for the torts of its subsidiary:

> It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries . . . Neither does the mere fact that there exists a parent-subsidiary relationship between two

> corporations make the one liable for the torts of its affiliate.

U.S. v. Bestfoods, 524 U.S. 51, 61 (1998) (internal quotation marks and citations omitted). "A corporation and its stockholders are generally to be treated as separate entities . . . Thus it is hornbook law that the exercise of the control which stock ownership gives to the stockholders . . . will not create liability beyond the assets of the subsidiary." *Id.* at 61-62. This Court reaffirmed conclusively in *Bestfoods* that piercing the corporate veil is the exception, not the rule. Thus, for the SJC to have done so in order to find personal jurisdiction over petitioners is doubly dangerous from a constitutional standpoint. The SJC's opinion is even at odds with the First Circuit. For example, in *Donatelli v. Nat'l Hockey League*, 893 F.2d 459 (1st Cir. 1990), the court stated: "*Only if – and after* – minimum contacts have been shown to exist may such contacts 'be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" *Id.* at 464 (emphasis added) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)). Thus, the First Circuit (and every other court in the country—including the SJC in prior decisions) recognizes that "the judicial inquiry . . . has two stages." *Id.* at 465.

4. In *International Shoe*, this Court held that the Due Process Clause precludes a State from exercising *in personam* jurisdiction over a nonresident defendant unless the defendant has "minimum contacts" with the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial

justice." 326 U.S. at 316. Here, the SJC did no analysis whatsoever. Therefore, this entire case has ignored this Court's constitutionally based requirement that the *International Shoe* test *consists of two separate steps*: (1) "minimum contacts"; and (2) "fair play and substantial justice." "Once it has been decided that a defendant purposefully established minimum contacts with the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice." *Burger King*, 471 U.S. at 476 (internal quotations omitted). The existence of minimum contacts, in other words, is the "constitutional touchstone." *Id.* at 474.

The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations. By requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," *Shaffer*, 433 U.S. at 218 (Stevens, J., concurring), the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Although this protection operates to restrict state power, it "must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause" rather than as a function "of federalism concerns." *Burger King*, 471 U.S. at 472 n.13 (quoting *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-703, n.10 (1982)).

5. The violation of Due Process here should not be allowed to stand because even though BASI was not a subsidiary of any other defendant, this case carries serious implications for not only the operation of normal, run-of-the-mill parent-subsidiary relationships, but the more routine "affiliate" relationships between companies that have recently become more commonplace in American commerce. The SJC's approach to personal jurisdiction clearly violates this Court's venerable precedents in three serious ways. First, it deliberately disregards the general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation is not liable for the acts of its subsidiaries. *See Bestfoods*, 524 U.S. at 61. Second, it ignores the equally fundamental principle of corporate law that a subsidiary's corporate veil may be pierced only when the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf. *See id.* at 62. Third, the SJC's approach would also effectively eliminate the ability of companies to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp.*, 444 U.S. at 297.

6. The intervening denial of certiorari on December 8, 2008 in *Beard v. Hannon*, No. 08-326, means that this Court has not discussed the constitutional parameters of "minimum contacts" for over 15 years. *See Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 307-08 (1992). In *Beard*, unlike in the instant action, at least the lower court articulated and applied this Court's settled constitutional test for personal jurisdiction. *See Hannon v. Beard*, 524 F.3d 275, 279-85

(1st Cir. 2008). By denying certiorari here, this Court gives a "green light" to courts across the country (including Massachusetts) to ignore this Court's directive in *Shaffer* "that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Shaffer*, 433 U.S. at 212. *See also* 4A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1072 (3d ed. 2002) ("the *Shaffer* opinion appears to impose the *International Shoe* standard on all assertions of jurisdiction.").

It was not always this way. Between 1945, when this Court first established the *International Shoe* test and declared that Due Process precludes a State from exercising personal jurisdiction unless there are certain "minimum contacts" such that "the maintenance of the suit does not offend traditional notions of fair play and substantial justice," and 1987 with its decision in *Asahi Metal Indus., Inc. v. Superior Court*, 480 U.S. 102 (1987), this Court decided 18 cases involving the *International Shoe* test. *See* McFarland, 68 MO. L. REV. at 771. Under the prior, territorial-based regime of *Pennoyer* v. *Neff*, 95 U.S. 714 (1877), which lasted for 68 years, this Court addressed the question of personal jurisdiction "at least fifty-three times." McFarland, 68 MO. L. REV. at 769. In sharp contrast to that historically high level of attention, as of 1998 this Court "ha[d] not returned to the minimum contacts test for sixteen years." ABA Litigation Section, *Business & Commercial Litigation in Federal Courts* §2.6, at 83 (1998). As of now, the interregnum has been 21 years.

7. So as to avoid further constitutional confusion, this Court should use this case to answer the following question:

> Can a federal or state court ignore the controlling constitutional standard under the *International Shoe* and *Shaffer* line of cases and exert personal jurisdiction over a nonresident defendant solely by attributing another defendant's forum contacts to that defendant without first conducting the constitutionally required "minimum contacts" analysis for that individual defendant without that being a violation of the Due Process Clause as applied by the Fifth and Fourteenth Amendments to the United States Constitution?

"As a substitute analysis that bypasses the traditional minimum contacts analysis, jurisdictional veil-piercing must [*still*] comport with the goals and constitutional underpinnings of personal jurisdiction." Jennifer A. Schwartz, *Piercing the Corporate Veil of an Alien Parent for Jurisdictional Purposes: A Proposal for a Standard that Comports With Due Process*, 96 CAL. L. REV. 731, 763 (2008). The SJC's opinion in this case falls far short of this standard, because at no time did the court undertake the "minimum contacts" analysis for each defendant as required by *International Shoe*, *Shaffer*, and their progeny. Instead, the SJC substituted its own view of jurisdictional veil-piercing for this Court's 60 years of precedents.

CONCLUSION

The Court should grant this petition for rehearing because the judgment of the Massachusetts court should be reversed and the case remanded for proceedings in accordance with the Due Process Clause of the Fourteenth Amendment to the United States Constitution as well as this Court's long-held precedents.

Respectfully submitted,

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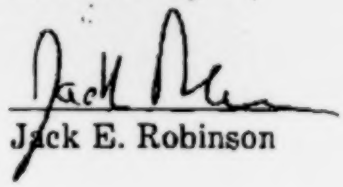
CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court and is presented in good faith and not for delay.



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